Supreme Court, U.S.
FILED
06-152 JUL 31 2006
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

R & F PROPERTIES OF LAKE COUNTY, INC.,
F/K/A LEESBURG FAMILY MEDICINE,
PETITIONER,

v.

UNITED STATES OF AMERICA *EX. REL.* KARYN L. WALKER,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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July 2006

QUESTION PRESENTED

Whether liability under the civil False Claims Act, 31 U.S.C. §§ 3729-3733, can be based on a reasonable interpretation of an ambiguous regulation or contractual provision?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner R & F Properties of Lake County, Inc., has no parent corporation. No publicly held company owns 10 percent or more of the stock of R & F Properties of Lake County, Inc.

The only identifiable legal entity related to R & F Properties of Lake County, Inc. is Leesburg Family Medicine, P.L., f/k/a Robinson & Foster, P.L.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner R&F Properties of Lake County, Inc., f/k/a Leesburg Family Medicine, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit (Pet. App. 1a-19a) is reported at 433 F.3d 1349. The order of the Eleventh Circuit denying rehearing and rehearing *en banc* (Pet. App., 37a) is unreported. The opinion of the district court (Pet. App. 20a-36a) also is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2005. A petition for rehearing was denied on March 31, 2006. Justice Thomas extended the time to file this petition up to and including July 29, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that no person shall be deprived of "property without due process of law." U.S. Const. amend. V.

This case involves the civil False Claims Act, 31 U.S.C. §§ 3729-3733 (2006). It also involves the criminal false claims and false statement statutes, 18 U.S.C. §§ 287, 1001 (2006). In addition, it involves various Medicare

regulations, 42 C.F.R. §§ 410.10, 410.26 (2006). These relevant statutory and regulatory provisions are set forth in the Appendix to the petition, Pet. App. 38a-59a.

STATEMENT OF THE CASE

Petitioner R&F Properties of Lake County, Inc. ("R&F"), formerly known as Leesburg Family Medicine, is a family medical practice of five physicians with offices in Leesburg and Lady Lake, Florida. A majority of R&F's patients are covered by Medicare, a federally funded health insurance program. Respondent Karyn L. Walker ("Walker") worked as a nurse practitioner for R&F from 1997 to 1999.

On May 6, 2002, Walker filed a one-count complaint under seal in the United States District Court for the Middle District of Florida pursuant to the *qui tam* provisions of the civil False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733 (2006). Walker alleged that R&F improperly billed the United States for her nurse practitioner services in violation of the FCA. This case comes to the Court from the United States Court for Appeals for the Eleventh Circuit's reversal of a grant of summary judgment for Petitioner R&F.

Under Medicare Part B, a nurse practitioner can be billed in one of two ways. The nurse practitioner services can be billed to a patient under the nurse practitioner's Unique Provider Identification Number ("UPIN"). Alternatively, the services can be billed under the physician's UPIN as "incident to the service of a physician." 42 C.F.R. § 410.10, 410.26 (2006). During Walker's tenure at R&F, the Medicare regulations supplied no further definition of the phrase "incident to the service of a physician."[1] If the nurse

[1] An amended version of the Medicare regulations that became effective on January 1, 2002, clarified the "under the direct supervision of the physician" requirement by providing that direct supervision requires a

practitioner is billed under the physician's UPIN, the reimbursement is approximately 15% higher than if the nurse's UPIN is used.

At times during evenings and weekends, Walker provided services to patients when no R&F physician was physically present in the office. R&F's policy was to bill for these services under the physician's UPIN number because the nurse practitioner worked under the general supervision of the physicians and the physicians were immediately available via telephone or beeper to discuss a case with the nurse practitioner. Walker alleged that R&F knowingly submitted to the United States false and fraudulent claims for Medicare reimbursement by billing Walker's services as "incident to" a physician services even though on many occasions a physician was not on site and Walker would see new patients and make initial diagnoses and treatment plans.[2]

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physician to be present in the office suite. 42 C.F.R. §§ 410.26, 410.32(b)(3)(ii)(2006). However, this clarifying regulation was issued more than two years after Walker's employment with R&F terminated.

[2] The Medicare insurance claim form that R&F used to submit claims for reimbursement to the United States, Health Insurance Claim Form RRB-1500 ("HCFA-1500"), contains a certification reading:

> I certify that the services shown on this form were medically indicated and necessary for the health of the patient and were personally furnished by me or were furnished incident to my professional service by my employee under my immediate personal supervision, except as otherwise expressly permitted by Medicare or CHAMPUS regulations.

The HCFA-1500 form states that, for services to be considered as "incident" to a physician's professional service, (1) they must be rendered under the physician's immediate personal supervision by his/her employee, (2) they must be an integral, although incidental part of a covered physician's service, (3) they must be of kinds commonly

The United States declined to intervene in Walker's lawsuit, and the complaint was unsealed. Under the *qui tam* provisions of the FCA, Walker continued to prosecute her allegations that R&F defrauded the United States in its charging of nurse practitioner services to Medicare.[3]

On October 7, 2004, the federal district court granted R&F's motion for summary judgment on the ground that plaintiff Walker could not present sufficient evidence that R&F's claims were false or fraudulent. Pet. App. 33a-35a. The court's opinion began by noting that the "penal nature of the False Claims Act requires careful scrutiny of any alleged misconduct under the statute." *Id.* at 25a. The district court then analyzed whether R&F's claims were legally false for billing nurse practitioner services as "incident to the services of a physician" when the physician was available via beeper, fax or phone but not physically in the office. The court looked to the statutes and regulations in place during Walker's tenure at R&F between 1997 and 1999 and found that "neither the Medicare statutes nor the regulations provided much guidance as to the level of supervision required in order to bill the services of a nurse practitioner or physician assistant as 'incident to.'" *Id.* at 27a.

The district court rejected Walker's argument that R&F submitted false claims because of the definition of "incident to" provided in the Medicare Carriers Manual. *Id.* at 27a-32a. The court noted that the manual, unlike a statute

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furnished in physician's offices, and (4) the services of nonphysicians must be included on the bills. The HCFA form did not mention a physician being present in the office suite.

[3] The FCA allows the *qui tam* relator to prosecute the action with or without the participation of the United States. 31 U.S.C. § 3730(b)-(c) (2006). The relator shares in between 15 and 25 percent of any recovery of damages and penalties if the United States intervenes and between 25 and 30 percent if the United States does not intervene. *Id.* at § 3730(d).

or regulation, does not have the force and effect of law.[4] The district court's opinion stated that "[w]hen statutes and regulations forming the basis of the Plaintiff's claims under the False Claims Act are ambiguous, the Plaintiff has the burden of proving that the statements made by the Defendant in presenting its claim for reimbursement were unreasonable." *Id.* at 34a, n.38 (citing *Luckey v. Baxter Healthcare Corp.*, 2 F. Supp. 2d 1034, 1049 (N.D. Ill. 1998), *aff'd*, 183 F.3d 730 (7th Cir. 1999)). The Court therefore granted the motion for summary judgment and dismissed the Complaint against R&F, ruling that Walker "failed to present sufficient evidence that [R&F's] interpretation of the terms, that it was appropriate to have a physician immediately available by phone while treating patients or for nonphysicians to change treatment plans or offer diagnoses under the supervision of a physician, contravened the requirements of the [HCFA] form or the Medicare statutes and regulations, thus violating the False Claims Act." *Id.* at 34a.

The United States Court of Appeals for the Eleventh Circuit reversed. The circuit court agreed with the trial court that the regulatory language that Walker contended R&F violated when submitting its reimbursement claims was ambiguous. *Id.* at 12a. However, the circuit court concluded that this ambiguity did not preclude a finding of FCA liability against R&F. *Id.* According to the Eleventh Circuit, "We agree that the regulatory language in effect until January 1, 2002 was ambiguous. But we disagree as to the legal significance of that ambiguity." *Id.*

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[4] The district court noted that there was no evidence that R&F agreed to comply with this manual – or any other Medicare training materials or publications – in order to receive payment from the Government. *Id.* at 32a. The court explained that the manual operates as a guideline for carriers – private companies that contract with Medicare to pay Part B bills – not providers like R&F; "the Carriers Manual is intended to instruct carriers as to whether to pay a claim and is not routinely provided to physicians." *Id.* at 30a-31a.

Even though the "incident to the service of a physician" language allegedly violated by R&F's Medicare claims was admittedly ambiguous, the Eleventh Circuit allowed Walker's FCA lawsuit to go forward. The Eleventh Circuit analyzed whether "at least some of these sources" of evidence provided by Walker would support her reading of the disputed regulatory language. *Id.* at 12a. The circuit court focused on the provisions of the Medicare Carrier's Manual, Medicare bulletins, seminar programs and expert testimony offered by Walker to support her interpretation of the "incident to" language. *Id.* at 12a-16a. The court acknowledged that none of these manuals, guidelines or other documents had the force of law. Nevertheless, the circuit court concluded that the various documents offered by Walker, "taken together," were sufficient support for her interpretation of the regulations to "raise an issue of fact" as to the falsity of R&F's reimbursement claims to Medicare. *Id.* at 16a.

Consequently, the Eleventh Circuit reversed the grant of summary judgment for defendant.[5]

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[5] The Eleventh Circuit also noted that a small subset of the false claims alleged by Walker to have been submitted occurred after January 1, 2002. *Id.* at 11a. These post-January 1, 2002 submissions would be covered by the amendments to the Medicare regulations that explicitly defined "incident to the service of a physician." *Id.* As a result, the appeals court ruled that these post-January 1, 2002 claims survived dismissal. In addition, the circuit court's decision addressed an unrelated discovery issue. *Id.* at 16a-18a. R&F's petition for certiorari does not seek review on the decisions below relating to claims for reimbursement filed post-January 1, 2002 or the discovery issue.

REASONS FOR GRANTING THE PETITION

The civil False Claims Act is described by the United States as its primary means of combating government contract fraud.[6] With treble damages and penalties of $5,500 to $11,000 per false claim, the FCA is a powerful tool for punishing false claims to the United States. In addition, the Act's unique *qui tam* provisions allow private whistleblowers to prosecute these actions and receive between 15% and 30% of any recovery achieved on behalf of the United States. Not surprisingly, FCA actions have proliferated, with almost 10,000 FCA cases filed since 1986 and settlements and judgments totaling more than $15 billion.[7]

Yet, the FCA also is subject to misuse. In bringing lawsuits under the FCA, plaintiffs have been able to take advantage of the complicated nature of the regulations and contracts involved in government programs. The regulations governing Medicare and Medicaid, drug pricing and marketing, defense contractor cost accounting, and natural resource leasing are exceedingly complex. FCA plaintiffs have seized upon ambiguities and legitimate disputes over interpretation to create allegations of fraud against government contractors. In many instances, FCA plaintiffs have been able to extract large settlements in lawsuits alleging that defendant violated an admittedly ambiguous regulation or contract.

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[6] Press Release, Eric Holder, Deputy Attorney General (Mar. 31, 2000), *available at* http://www.usdoj.gov/opa/pr/2000/March/159dag.htm (last visited June 27, 2006); Press Release, Department of Justice, DOJ to Hold Briefing on the Use of False Claims Act in Health Care Fraud Cases (Apr. 23, 1998), *available at* http://www.usdoj.gov/opa/pr/1998/April/194 .htm.html (last visited June 27, 2006).

[7] U.S. Gov't Accountability Office, *Information on False Claims Act Litigation* 5, 25 (2006), *available at* http://www.gao.gov/new.items/d06320r.pdf.

The Eleventh Circuit's decision below presents this problem of FCA cases arising from ambiguous government regulations or contracts. This petition for certiorari squarely raises the issue of whether an FCA case should be allowed to go forward where it is based on the defendant's reasonable interpretation of an admittedly ambiguous regulation or contract. This is an important issue on which the lower courts are in disarray. The Eleventh Circuit below, along with other lower courts, have allowed FCA cases to go forward even where the regulation or contract allegedly violated was ambiguous and the defendant's interpretation was reasonable. Other circuit courts faced with FCA cases based on alleged violations of ambiguous regulations or contracts have reached different results, dismissing on the grounds that a dispute as to regulatory interpretation cannot implicate FCA liability. Yet other courts have analyzed FCA cases involving ambiguous regulations or contracts by looking to the state of mind of the defendant or whether the defendant's interpretation was plausible. Furthermore, the well-established case law in criminal FCA and false statements cases – where the court is interpreting the same general statutory language – is that no liability can attach where the defendant relied on a reasonable interpretation of an ambiguous regulation or contract. Thus, this petition should be granted in order to resolve the confusion in the lower courts regarding whether an FCA case can be based on a reasonable interpretation of an ambiguous regulation or contract.

Moreover, it violates well-accepted constitutional and common law principles to allow FCA cases to go forward based on ambiguous regulations or contracts. In light of the FCA's onerous treble damages and penalties, this Court has recognized that the FCA is "essentially punitive in nature." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784-85 (2000). Due Process requires that, before imposing such a punishment, a person must

receive fair warning that her conduct is unlawful. Where the regulation or contract allegedly violated is ambiguous, the fair notice required by due process is clearly lacking. Similarly, the rule of lenity is applicable here since the government is seeking to impose punitive sanctions in the form of treble damages and hefty penalties for violation of an ambiguous regulation. In such circumstances, the rule of lenity requires that the ambiguity be resolved in favor of the defendant and the FCA action be dismissed. Furthermore, the doctrine that an ambiguous provision should be construed against the drafter also compels dismissal here. The government should not be allowed to benefit from ambiguities in regulations and contracts that the government drafted, and therefore FCA lawsuits (where the government is the primary beneficiary of any damages or penalties) should not go forward based on alleged violations of ambiguous regulations or contracts.

I. THE DECISION BELOW DEEPENS EXISTING CONFLICT AND CONFUSION AMONG THE CIRCUIT COURTS

A. The Eleventh Circuit's Decision Conflicts With Other Circuit Courts Regarding Whether A Civil False Claims Act Lawsuit Can Be Based On A Reasonable Interpretation Of An Ambiguous Regulation Or Contract

Supreme Court review is necessary to resolve conflict and confusion in the lower courts regarding whether, and under what circumstances, an alleged failure to comply with an ambiguous regulation or contract can serve as the basis for a FCA violation. The courts of appeals have reached different results when confronted with this fundamental question.

The Eleventh Circuit permits this FCA action to go forward against R&F, despite there being no dispute that the regulation allegedly violated was ambiguous and that R&F's interpretation of the ambiguous regulation was reasonable. The Eleventh Circuit expressly declared that the regulation was ambiguous during the relevant time period but held that this ambiguity did not preclude an FCA action based on the ambiguous regulation: "*We agree that the regulatory language in effect until January 1, 2002 was ambiguous. But we disagree as to the legal significance of that ambiguity.*" Pet. App. 12a (emphasis added). The Eleventh Circuit later emphasized this point of divergence from the district court's analysis leading to dismissal:

> [T]he district court found that the regulatory language that Walker claimed was violated when [R&F] submitted its claims was ambiguous and therefore could not, as a matter of law, serve as the predicate for a false claims action. We find error in the district court's reasoning.

Id. at 11a.

The Eleventh Circuit never attempted to challenge the district court's ruling by arguing that R&F's interpretation of the ambiguous regulation was somehow unreasonable. In fact, the circuit court never evaluated or discussed whether R&F's understanding of the "incident to" provision was reasonable. Instead, the Eleventh Circuit looked to whether the *plaintiff* had put forward sufficient evidence to support her interpretation of the regulation in question, with all inferences taken in her favor. Although the circuit court concludes that Walker's evidence, taken together and with all favorable inferences, created a material issue regarding the correct

interpretation of the ambiguous regulation, it nowhere disputed the reasonableness of R&F's interpretation.

The Eleventh Circuit's decision holds that a defendant's reasonable interpretation of an ambiguous regulation does not preclude an FCA action. Under the decision below, an FCA action survives as long as the plaintiff can come up with some support for her interpretation of the ambiguous regulation on which the FCA violation is based. At least one other circuit court has appeared to adopt a similarly liberal view allowing plaintiffs to go forward with FCA allegations based on violations of ambiguous regulations or contracts even where the defendant's interpretation is reasonable. *See United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 460 (9th Cir. 1999) (reversing trial court's ruling that a reasonable interpretation precludes liability under FCA; "[w]e hold that the district court erred in applying a 'reasonable interpretation' approach to determining falsity under the Act . . . ").

Other lower courts have adopted the diametrically opposite approach to ambiguity, emphasizing that the FCA was not intended to punish disputes over regulatory or contractual interpretations. These courts have followed the general rule that fraud cannot be predicated on a mere expression of opinion or legal dispute. *See, e.g.*, *United States ex rel. Morton v. A Plus Benefits, Inc.*, 139 Fed. Appx. 980, 984 (10th Cir. 2005) ("Expression of a legal opinion, in this case depending, as it does, on the resolution of two sets of inherently ambiguous determinations by defendants, cannot form the basis for an FCA claim."); *United States ex rel. Swafford v. Borgess Med. Ctr.*, 24 Fed. Appx. 491, 491 (6th Cir. 2001) ("Disputes as to interpretation of regulations do not implicate False Claims Act liability."); *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) ("[I]mprecise statements or differences in interpretation growing out of a disputed legal question are similarly not

false under the FCA."); *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1479 (9th Cir. 1996) (Defendant "took advantage of a disputed legal issue. This, as we have previously held, is not enough."); *Luckey v. Baxter Healthcare Corp.*, 2 F. Supp. 2d 1034, 1049 (N.D. Ill. 1998) (granting summary judgment for defendant because plaintiff's alleged regulatory violation "suffer[s] the fatal flaw of ambiguity.");[8] *Tyger Constr. Co. v. United States*, 28 Fed. Cl. 35, 56 (1993) (noting that FCA liability will not attach for a statement relating to contract term that is incapable of precise definition; "Indication is absent that Congress intended to penalize good faith disputes over contract liability.").[9]

Some lower courts have focused on the defendant's intent, concluding that the defendant's knowledge relating to the ambiguous regulation is central for determining FCA liability. In *Minnesota Association of Nurse Anesthetists v. Allina Health Systems*, 276 F.3d 1032 (8th Cir. 2002), the Eighth Circuit addressed a trial court decision granting summary judgment for defendant based on the ambiguity in the Medicare regulations. The Eighth Circuit reversed because it found a question of fact as to the state of mind of the defendants. According to that circuit court, "[i]f a

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[8] The *Luckey* court relied on the decision in *United States v. Napco Int'l. Inc.*, 835 F. Supp. 493, 497-98 (D. Minn. 1993). In *Napco*, "the court held that ambiguous statutory requirements, where no regulations further define those requirements, cannot hold a defendant to the government's strict interpretation, so long as defendant's interpretation was reasonable." *Luckey*, 2 F. Supp. 2d at 1049.

[9] *See also United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 682, 684 (5th Cir. 2003) (en banc) (Jones J., concurring) ("Further, where disputed legal issues arise from vague provisions or regulations, a contractor's decision to take advantage of a position can not result in his filing a 'knowing' false claim. . . . Where there are legitimate grounds for disagreement over the scope of a contractual or regulatory provision, and the claimant's actions are in good faith, the claimant cannot be said to have knowingly presented a false claim.") (citations omitted).

statement alleged to be false is ambiguous, the government (or here, the relator) must establish the defendant's knowledge of the falsity of the statement." *Id.* at 1053; *see also United States v. Estate of Rogers*, No. 1:97CV461, 2001 WL 818160, at *4 (E.D. Tenn. June 28, 2001) ("[I]t is immaterial whether the defendants did or did not make reasonable interpretations of the applicable HCFA rules and regulations . . . [T]he defendant's contention that they made a reasonable interpretation of HCFA's related-parties rules and regulations only goes to the scienter element and whether the defendants acted 'knowingly.'").

The Federal Circuit has gone off in yet another direction. In *Commercial Contractors v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998), it developed a more elaborate test based on the "plausibility" of the defendant's regulatory or contract interpretation and its state of mind.

> If a contractor submits a claim based on a plausible but erroneous contract interpretation, the contractor will not be liable, absent some specific evidence of knowledge that the claim is false or of intent to deceive. Yet when a contractor adopts a contract interpretation that is implausible in light of the unambiguous terms of the contract and other evidence (such as repeated warnings from a subcontractor or the fact that the interpretation is contrary to well-established industry practice), the contractor may be liable under the FCA or the CDA even in the absence of any deliberate concealment or misstatement of facts.

154 F.3d at 1366. The Federal Circuit offered this test without citation or any discussion of its underlying logical or precedential support.

As the cases referenced above demonstrate, the circuit courts often reach conflicting outcomes where confronted with FCA allegations based on ambiguous regulations or contract provisions. The practical implications of the divergent lower court analytical approaches to this issue cannot be overemphasized. A trial court is generally in a position early on in a case to determine whether the regulation or contract provision allegedly violated was ambiguous and whether the defendant's interpretation was reasonable as a matter of law. Consequently, defendants in some jurisdictions are able to win dismissal of the FCA action at an early stage. However, in those courts which consider ambiguity in the regulations or contracts allegedly violated to be immaterial or only relevant to the defendant's state of mind, defendants face expensive discovery and will encounter difficulty prevailing on motions prior to trial.[10] Faced with

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[10] *See United States v. Taber Extrusions, LP*, 341 F.3d 843, 846 (8th Cir. 2003) (in FCA case, "[p]articularly when the issue turns on the defendant's intent or scienter, summary judgment for the plaintiff is inappropriate"); *United States ex rel. Local 342 Plumbers & Steamfitters v. Dan Caputo Co.*, 321 F.3d 926, 931-32 (9th Cir. 2003) (in FCA case, "the extent to which contractors may be deemed to have knowledge . . . [is] both difficult and insufficiently developed on the current record to allow for summary judgment"); *see also Ashman v. Barrows*, 438 F.3d 781, 784 (7th Cir 2006) (noting that the court is "particularly leery of resolving issues involving a state of mind on summary judgment. . . [S]ummary judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles.") (internal citation and quotation marks omitted); *Justofin v. Metropolitan Life Ins. Co.*, 372 F.3d 517, 524 (3d Cir. 2004) ("The issue of intent is particularly inappropriate for resolution by summary judgment") (internal quotation marks omitted); *Gelb v. Bd. of Elections*, 224 F.3d 149, 157 (2d Cir. 2000) ("summary judgment is generally inappropriate where questions of intent and state of mind are implicated").

such a prospect as well as the jury risk of potential treble damages and penalties, most FCA defendants will settle.

A stark example is provided by *United States v. Newport News Shipbuilding, Inc.*, 276 F. Supp. 2d 539 (E.D. Va. 2003). There, the district court agreed that the regulation at the core of the FCA allegations was ambiguous. According to the district court, the regulatory language allegedly violated by defendant's submissions to the Navy "ha[d] been the subject of considerable debate since the mid-1970's. Significantly, this debate unfolded not only between the government and industry, but among different government agencies, as well." *Id.* at 562. The court cited to several GAO reports, a federal district court opinion, and numerous articles and commentaries reflecting that "the debate regarding the proper interpretation of the regulatory phrase . . . has been an ongoing and unresolved question since that time [the mid-1970's]." *Id.* at 562-63. Yet, despite the undisputed and longstanding ambiguity in the regulation allegedly violated, the district court declined to grant summary judgment for defendant Newport News Shipbuilding. Instead, the trial judge found that there were still material factual issues relating to the defendant's knowledge under the FCA.[11] Within weeks of the denial of its summary judgment motion, the defendant agreed to pay approximately $60 million in a

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[11] The FCA's knowledge standard requires that a plaintiff demonstrate (i) actual knowledge of the falsity, (ii) deliberate ignorance of the falsity; or (iii) reckless disregard of the falsity. 31 U.S.C. § 3729(b). Although recognizing that the regulation was ambiguous and long debated, the district court refused to grant summary judgment because it ruled that there were issues under a reckless disregard theory. According to the *Newport News* court, a fact-finder "might conclude that NNS acted with reckless disregard as to the impermissibility under the FAR [Federal Acquisition Regulations] of its Double Eagle IR&D charges." 276 F. Supp. 2d at 566.

settlement. *See* Peter Pae, *Northrop Settles Two U.S. Suits*, L.A. TIMES, Aug. 27, 2003, § 3, at 2.

The FCA was intended to address contractors defrauding the United States.[12] Yet, *Newport News* and other similar cases allow FCA actions to proceed based on "disputed legal issues" of interpretation of ambiguous regulations and contracts. FCA cases arising from reasonable interpretations of ambiguous regulations and contracts should not be permitted to waste judicial and party resources, nor should they be used to extract multi-million dollar settlements from defendants. Only the Supreme Court can end the confusion and impose uniformity on this important issue. This Court should grant the petition and prevent FCA cases from going forward where the defendant has submitted a claim for reimbursement relying on a reasonable interpretation of an ambiguous regulation or contract.

B. The Eleventh Circuit's Decision Conflicts With Numerous Criminal False Claims Act Cases

Supreme Court review is especially appropriate here because the Eleventh Circuit decision – as well as the other lower courts that have allowed similar FCA actions to go forward based on alleged violations of ambiguous regulations and contracts – conflicts with a long line of decisions interpreting the parallel criminal FCA statute, 18 U.S.C. § 287.

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[12] The United States has a vast array of administrative and judicial remedies available to it to address contractual disputes with its contractors. Through these avenues, the government may be entitled to recover under contractual or common law theories from a contractor who adopts a reasonable interpretation contrary to the government's view of an ambiguous regulation or contract. However, the contractor should not be accused of defrauding the United States under the FCA nor subject to the FCA's treble damages and penalties.

Historically, the criminal and civil FCA was a single statute, with two penalties. Act of March 2, 1863, ch. 67, 12 Stat. 696-98. The original 1863 Act created one standard of liability for individuals who "present or cause to be presented . . . any claim upon or against . . . the United States . . . knowing such claim to be false, fictitious, or fraudulent." The Act provided that violators were subject to both a criminal and civil penalty—imprisonment for "not less than one nor more than five years" (criminal) and fines of $2,000 per act of fraud as well as "double the amount of damages which the United States may have sustained" (civil). *Id.*

In 1874, the criminal and civil provisions of the FCA were re-codified separately,[13] but the language regarding liability was fundamentally unchanged. *See Olson v. Mellon*, 4 F. Supp. 947, 949 (W.D. Penn. 1933), *aff'd sub nom. United States ex rel. Knight v. Mellon*, 71 F.2d 1021 (3rd Cir. 1934).[14] In *Olson v. Mellon*, the relator conceded that the criminal FCA did not reach to income tax fraud; nevertheless, the relator claimed that the civil FCA should be given a more "liberal construction" and therefore should impose liability on persons who commit income tax fraud. 4 F. Supp. at 949. The Third Circuit affirmed the dismissal of plaintiff's action, maintaining a single standard of liability for criminal and civil actions brought under the FCA.

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[13] The criminal and civil sections of the FCA have undergone numerous reenactments and re-codifications. Currently, the portions of the Act imposing criminal penalties are codified in 18 U.S.C. §§ 286, 287, 1001, and 1002. The portions of the act providing for civil remedies are codified 31 U.S.C. §§ 3729 – 3733. The text of these provisions is set out in the Appendix at pages 38a-59a.

[14] Liability under the two sections remained so similar that particularly ambitious citizens waited for the United States to file criminal indictments under the FCA and then filed their own civil FCA suits as relators. *See* S. REP. No. 345, 99th Cong., 2d Sess. at 10-12, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275-76.

In 1943, the Supreme Court confirmed this 'one standard of liability with two penalties' view. In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), the Court held that the substantive language in both the civil and criminal FCA must have the same meaning for purposes of judicial construction. The Supreme Court rejected the defendant's contention that the civil and criminal FCA statutes should be construed differently.

> [W]e cannot say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different meaning where the same language is invoked by an informer.

Id. at 542. The *Hess* Court found that the criminal and civil sections of the FCA were part of a single substantive scheme providing "both for a criminal punishment and a civil remedy" and ruled that the defendant was subject to liability in both arenas. *Id.* at 549. *Cf. Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (applying "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (internal quotation marks omitted).

Although subsequently amended, the substantive provisions of the criminal and civil FCA did not change and should continue to be construed in the same manner. Thus, a jury verdict or plea in a criminal FCA case remains res judicata in a civil FCA case. 31 U.S.C. § 3731(d).[15] In

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[15] *See, e.g., United States v. Szilvagyi*, 398 F. Supp. 2d 842, 844-45 (E.D. Mich. 2005); *United States v. St. Luke's Subacute Hosp.*, No. 00-1976, 2004 WL 2905237, at *4 (N.D. Cal. Dec. 16, 2004); *United States v. Cripps*, 460 F. Supp. 969, 976-77 (E.D. Mich. 1978).

addition, courts interpreting the language of the civil FCA continue to look and cite to the criminal FCA for guidance.[16] The two statutes continue to share similar language regarding the key substantive elements.[17] Given the Supreme Court's directive in *Marcus v. Hess* regarding the treatment of similar substantive language in both statutes, and given the lack of any changes to the key substantive elements, the criminal and civil FCA should continue to be construed in a consistent fashion.

Yet, contrary to their historical development and Supreme Court guidance, the criminal and civil FCA statutes have been construed very differently concerning alleged violations of ambiguous regulations or contracts. Unlike the

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[16] *See e.g.*, *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 675 (5th Cir. 2003) (citing criminal FCA case, *United States v. Burns*, 162 F.3d 840 (5th Cir. 1998), to support the proposition that the defendant must know the claim was "false or fraudulent"); *UMC Elecs. Co. v. United States*, 43 Fed. Cl. 776, 794 (1999) (citing to a criminal FCA case, *United States v. Race*, 632 F.2d 1114 (4th Cir. 1980), in discussing the use of expert testimony to determine "falsity"); *United States v. Hughes Helicopter Co.*, No. CV 89-5760SVN, 1993 WL 841192 (C.D. Cal. Aug. 25, 1993) (citing to *Race*, 632 F.2d 1114, to support its holding that the government failed to prove that the defendant's claims were "false"), *aff'd*, 71 F.3d 321 (9th Cir. 1995).

[17] The civil portion of the Act imposes liability on any person who "knowingly presents, or causes to be presented to an officer or employee of the United States government . . . a false or fraudulent claim for payment or approval" or any person who "knowingly makes . . . a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a). The criminal portion of the Act imposes a fine and up to five years in prison for "[w]hoever makes or presents to any person or officer . . . of the United States . . . any claim upon the United States, or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent . . . ." 18 U.S.C. § 287. While post-1986 the plaintiff must prove that the claim was false by a "preponderance of the evidence" in the civil context, the 1986 Amendments did not alter the substantive definition of falsity. 31 U.S.C. § 3731(c).

decision below and many other civil FCA decisions, the circuit courts in the criminal context have been unwilling to allow prosecutions to go forward where the alleged FCA violation is based on a reasonable interpretation of an ambiguous regulation or contract. The criminal FCA cases have set a considerably more stringent standard. Numerous circuit courts have held that no liability exists where the defendant in a criminal FCA case relied on a reasonable interpretation of the regulation or contract provision. As the Tenth Circuit has stated, "the Government bears the burden to negate any reasonable interpretations that would make a defendant's statement factually correct where reporting requirements are ambiguous." *United States v. Migliaccio*, 34 F.3d 1517, 1525 (10th Cir. 1994).[18] *See, e.g., United States v. Whiteside*, 285 F.3d 1345, 1351-52 (11th Cir. 2002) ("In a case where the truth or falsity of the statement centers on an interpretative question of law, the government bears the burden of proving . . . that the defendant's statement is not true under a reasonable interpretation of the law."); *United States v. Johnson*, 937 F.2d 392, 399 (8th Cir. 1991) ("The Government must negative any reasonable interpretation that would make the defendant's statement factually correct.") (internal quotation marks omitted); *United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980) (defendant "cannot be found guilty of a false statement under a contract beyond a reasonable doubt when his statement is within a reasonable construction of the contract."); *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir. 1978) ("In light of these ambiguities, . . . the government must negative any reasonable interpretation

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[18] The criminal laws alleging fraud against the United States are prosecuted as false statements and/or false claims violations under 18 U.S.C. §§ 287, 1001. The same statutory construction should apply to these two statutes as to the FCA. Section 3729(a)(2) of the civil FCA, for example, makes it a violation to "knowingly make[] . . . a *false record or statement* to get a" false claim paid by the Government. *See supra* at n.16.

that would make the defendant's statement factually correct.").[19]

The Eleventh Circuit held the case against R&F could go forward since the plaintiff could show that she had a reasonable regulatory interpretation. In contrast, the numerous criminal cases involving defrauding the government hold that no liability attaches if the defendant's interpretation of the regulation or contract is reasonable. The Supreme Court should grant certiorari to resolve this conflict and ensure that "the same substantive language has one meaning" in criminal and civil FCA proceedings.

II. THE DECISION BELOW VIOLATES BASIC CONSTITUTIONAL AND COMMON LAW PRINCIPLES

This Court has recognized that the civil FCA is "essentially punitive in nature." *Vermont Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 784 (2000). The 1986 Amendments to the civil FCA imposed treble damages and penalties of $5,500 to $11,000 (now adjusted for inflation) per false claim. These enhanced damages and penalties went beyond what was necessary to compensate the United States for any losses. The Court noted that "the very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Id.* at 786 (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981)). In 2003, although acknowledging that the treble

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[19] *See also United States v. Barsanti,* 943 F.2d 428, 432 (4th Cir. 1991) (adopting *Anderson* and *Race* in requiring that government has burden of "negativ[ing] any reasonable interpretation that would make the defendant's statement factually correct"); *United States v. Dale*, 991 F.2d 819, 833 (D.C. Cir. 1993) (same).

damages had a compensatory side, the Supreme Court reaffirmed its characterization of the post-1986 FCA as an "essentially punitive" statute. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 120 (2003).[20]

In light of the punitive sanctions facing FCA defendants, the Eleventh Circuit's decision does not comport with basic constitutional and common law protections. First, the Eleventh Circuit's decision violates the fair notice requirement of due process by holding a government contractor liable even if it is unaware of the falsity of its claim due to the regulation's ambiguity. Second, the Eleventh Circuit's decision violates the rule of lenity's requirement that ambiguities be resolved in a defendant's favor when penal sanctions are implicated. Finally, the Eleventh Circuit's decision violates the well-established doctrine of *contra proferentem* which requires construing ambiguous language against the drafter of the language, here the United States. While compensatory, contractual-based damages may be appropriate, this Court should grant review and declare that the FCA's extreme sanctions cannot be used to punish a reasonable interpretation of an ambiguous regulation or contract.

A. The Eleventh Circuit's Decision Is Contrary To The Due Process Clause

Due process requires that a person receive "fair warning" that his conduct is unlawful. *United States v.*

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[20] *See also United States v. Mackby*, 261 F.3d 821, 831 (9th Cir. 2001) (civil FCA penalties are "not solely remedial . . . [they are] subject to an Excessive Fines Clause analysis under the Eighth Amendment"); *United States ex rel Dunleavy v. County of Delaware*, 279 F.3d 219, 223 (3rd Cir. 2002) ("the FCA's treble damages provision is punitive"), *vacated on other grounds*, 538 U.S. 918 (2003); *Hays v. Hoffman*, 325 F.3d 982, 992 (8th Cir. 2003) ("we agree with the Ninth Circuit that FCA penalties are punitive in nature").

Lanier, 520 U.S. 259, 265 (1997) ("The . . . principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.") (internal quotation marks omitted). An essential component of fair notice is the requirement that a statute or regulation be written with sufficient clarity and not be so ambiguous that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* at 266 (internal quotation marks omitted); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.").

While most commonly found in the criminal context, courts also apply a fair notice requirement for deprivation of property in the civil context. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Due Process Clause thus has been found to prevent the imposition of administrative sanctions without adequate warning of the conduct prohibited. *See, e.g.*, *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 217 (4th Cir. 1997) ("A regulation which allows monetary penalties against those who violate it must give fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability.") (citations and quotations omitted); *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) ("In the absence of notice — for example, where the regulation is not sufficiently clear to warn a party about what is expected of it — an agency may not deprive a party of property by imposing civil or criminal liability."); *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987) ("The Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules.").

The application of due process principles to ambiguous agency pronouncements can be seen most clearly

in a case involving penalties assessed a defendant under OSHA regulations. *See Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). Then Judge Scalia, writing for the court, stated that "[i]f a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express . . . . [T]he Secretary as enforcer of the Act has the responsibility to state with ascertainable certainty what is meant by the standards he has promulgated." *Id.* at 156. Finding the regulation ambiguous and the defendant's interpretation of the statute reasonable, the D.C. Circuit held that the regulation failed to give fair notice sufficient to impose penalties. *Id.* at 156-57.[21]

If a government contractor cannot discern the meaning of the regulation and follows a reasonable interpretation of the requirements, it cannot be held liable for punitive sanctions. *See General Elec.*, 53 F.3d at 1329; *see also Trinity Broad. of Fla., Inc. v. FEC*, 211 F.3d 618, 628 (D.C. Cir. 2000). Here, there is no dispute that the regulation relating to billing nurse practitioners was ambiguous. The *qui tam* relator was unable to point to any binding agency promulgations that provided sufficient warning. Tellingly, the Government elected not to intervene in this FCA lawsuit. Moreover, the regulation had to be amended in 2002 to clarify its meaning on this very point relating to the meaning of the "incident to the service of a physician" language. *See* 42

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[21] *See also United States v. Hoechst Celanese Corp.*, 128 F.3d 216 (4th Cir.1997) (finding agency interpretation of regulations to be permissible but setting aside administrative sanctions on fair warning grounds because of ambiguity in the regulations); *General Elec. v. EPA*, 53 F.3d 1324, 1333-34 (DC Cir. 1995) (same; "Where, as here, the regulations and other policy statements are unclear, where the petitioner's interpretation is reasonable, . . . EPA thus may not hold GE responsible" for agency punishment), *Rollins Environmental Services, Inc. v. EPA*, 937 F.2d 649 (D.C. Cir. 1991) (same). Envtl. Servs.

C.F.R. § 410.26 (2002). In these circumstances, it is evident that R&F's interpretation was reasonable in the face of the regulation's then-existing ambiguity and that the fair warning necessary to impose the FCA's penal sanctions is wholly lacking.

For due process purposes, a person should not be subject to punishment for a false claim if the regulation under which the claim is made is ambiguous and the claimant's interpretation of the regulation is reasonable. This petition should be granted so that this Court can reaffirm this elemental principle.

B. The Eleventh Circuit's Decision Is Contrary To The Rule of Lenity

The rule of lenity is "the canon of strict construction of criminal statutes [which] ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266 (1997). In operation, it is an interpretive rule which states that when a criminal statute is ambiguous, courts will resolve the ambiguity in favor of the accused. *United States v. Kozminiski*, 487 U.S. 931, 952 (1988); *see also Whalen v. United States*, 445 U.S. 684, 694-95 & n.10 (1980).

The rule of lenity has been extended outside of the purely criminal context. In *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517 (1992), a firearms manufacturer sued for a refund of tax imposed under the National Firearms Act ("NFA"). The Supreme Court concluded that the NFA was ambiguous in its definition of firearms subject to a special excise tax under that statute. Although a civil tax case, the Supreme Court applied the rule of lenity and resolved the ambiguity in the taxpayer's favor. *Id.* In doing so, the Court noted that the NFA had both civil and criminal applications and therefore found it appropriate to apply the

rule of lenity in light of the duel nature of many aspects of the NFA. The *Thompson* Court explicitly rejected the argument that "lenity should not be applied because this is a 'tax statute' rather than a 'criminal statute.'" *Id.* at n.10 (citing *Crandon v. United States,* 494 U.S. 152, 168 (1990) (applying rule of lenity to a civil complaint which invoked criminal conflict of interest provisions)).

As discussed above, the civil FCA is similarly intertwined with its criminal counterpart. Thus, the *Thompson* Court's reasoning that lenity is appropriate even if a statute is construed in its civil setting, rather than in its criminal setting, applies with equal force to the treatment of ambiguous regulations in the FCA context. The rule of lenity demands that the ambiguity in the regulations or contracts be construed in favor of the defendant. This rule of construction argues against imposing punitive FCA treble damages and penalties on claims for reimbursement submitted based on R&F's reasonable interpretation of an admittedly ambiguous regulation. The rule of lenity has several underlying policy rationales: to promote fair notice to those subject to penal sanctions, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors and courts. *Kozminiski,* 487 U.S. at 952; *United States v. Bass*, 404 U.S. 336, 347-348 (1971). These policy rationales are all advanced by declining to base FCA punishments on reasonable interpretations of ambiguous regulations or contracts.

C. Eleventh Circuit's Decision Is Contrary To The Principle Of Interpreting An Ambiguous Provision Against Its Drafter

The doctrine of *contra proferentem* is a "general maxim that a contract should be construed most strongly against the drafter." *See United States v. Seckinger*, 397 U.S.

203, 210 (1970). Because the HCFA-1500 certification form and the relevant regulation, 42 C.F.R. § 410.26, incorporated into the Medicare reimbursement claims were drafted by the government, their ambiguity should be construed in favor of the defendant R&F and the government should not be allowed to gain the windfall of the FCA's treble damages and penalties.

"Contra proferentem applies when a contractor's reading of an ambiguous contract provision is reasonable in itself." *United States v. Turner Constr. Co.*, 819 F.2d 283, 286 (Fed. Cir. 1987). If the government concedes that that the language is ambiguous and that "there is an alternative construction of the clause that is both 'reasonable and practical,'" the "construction-against-drafter principle [will] operate." *Seckinger*, 397 U.S. at 211. Interpretation of ambiguous contract terms against the drafter is favored when the government dictated the provisions of the contract. *Id.* at 216.

Here, R&F has a contractual relationship with the government under the Medicare program. *See* 42 C.F.R. § 489.11 (2005) ("If the provider wishes to participate, it must return both copies of the agreement, duly signed by an authorized official, to CMS . . . ."); *see also* 42 CFR §§ 489.1–489.10; 489.12–489.18 (2005). The HCFA form and regulation are part of the contractual relationship whereby R&F is reimbursed for its treatment of patients pursuant to this contractual agreement. R&F has engaged in a reasonable interpretation of an ambiguous provision drafted by the government. Accordingly, the doctrine of contra proferentem compels that the ambiguity be construed in favor of R&F and no FCA liability attach to its reimbursement claim submitted under this government contract.[22]

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[22] In *Turner*, the Federal Circuit construed a contract against the United States as drafter:

III. THE QUESTION PRESENTED IN THIS CASE IS FAR-REACHING AND OF EXCEPTIONAL IMPORTANCE

The issue presented by this petition – whether contractors can be subject to FCA lawsuits based on reasonable interpretations of ambiguous regulations or contracts – is of great consequence for all entities contracting with the United States government. The United States government is the world's largest consumer of goods and services, with total discretionary spending under FY 2007 expected to exceed $870.7 billion. Virtually every major American business provides some product or service to the federal government. Subjecting the many companies that contract with the federal government to the treble damages and penalties of the FCA in instances where they reasonably interpret ambiguous regulations or contracts will result in the federal government incurring higher costs and may even deter some companies from contracting with the government.[23]

> Having concluded that Turner's interpretation of the contract was reasonable, we apply the rule of *contra proferentem*, which requires that a contract be construed against the party who drafted the document. *Contra proferentem* applies when a contractor's reading of an ambiguous contract provision is reasonable in itself. This rule correctly requires the drafter to use care and completeness in creation of a contract.

819 F.2d at 286 (internal citations omitted).

[23] According to a report issued by the American Medical Association, 52% of physicians reported that the complexity of the regulations made them less inclined to see Medicare patients. AMERICAN MEDICAL ASSOCIATION, *Rethinking Medicare: Solutions for Medicare's Short- and Long-term Problems* (2002), *available at* http://www.ama-assn.org/ama1/pub/upload/mm/363/rethinkingmedicare.pdf.

Goods and services are invariably provided to the government pursuant to a web of complex government regulations or contracts. The Medicare regulations have been called by courts "among the most completely impenetrable texts within human experience." *Rehab. Ass'n v. Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994). The FDA laws governing pharmaceuticals are equally problematic.[24] Defense contractors are subject to the multi-volume Federal Acquisition Regulations.[25] The rules governing leasing of energy resources also are exceedingly dense and complicated.[26]

These complex regulations and contracts are, in effect, a trap for the unwary. Under the Eleventh Circuit's decision and other similar lower court decisions, the ambiguity in these regulations and contracts can be turned against the private contractor so that a private plaintiff or the Department of

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[24] *See, e.g., Washington Legal Foundation v. Henney*, 128 F. Supp. 2d 11 (D.D.C. 2000) ("[a]fter six years' worth of briefs, motions, opinions, Congressional acts, and more opinions, the issue remains 100% unresolved, and the country's drug manufacturers are still without clear guidance as to their permissible conduct" under FDAMA and CME guidelines).

[25] *See, e.g. United States v. Data Translation, Inc.*, 984 F.2d 1256, 1261 (1st Cir. 1992) (Breyer, J.) (affirming dismissal of FCA action; "we think a literal reading of the [government] disclosure form creates ambiguity and incomprehensibility and . . . we conclude that no reasonable person . . . could have believed that the Government really wanted [what] the language seems to ask."); *X Corp. v. Doe*, 816 F. Supp. 1086 (E.D. Va. 1993) (applicable FAR regulations so complex that no one understood them).

[26] *See, e.g., United States ex rel. Grynberg v. Praxair, Inc.*, 207 F. Supp. 2d 1163 (D. Colo. 2001) (discussing complex agreement between government and defendant regarding methodology for measuring and reporting gas production and gas volumes for royalty purposes), *rev'd in part on other grounds*, 389 F.3d 1038 (10th Cir. 2004).

Justice can extract large FCA settlements. The reality is that few businesses want to incur the risk, expense, distraction and negative press involved in going to trial, especially when faced with the possibility of treble damages and penalties of $11,000 per claim. However, the Eleventh Circuit's decision below, as well as other similar lower court decisions, prevent early dismissal of these FCA cases grounded on ambiguous regulations and contracts. Instead, these FCA cases based on reasonable interpretations of ambiguous regulations or contracts are allowed to proceed forward.

The result is FCA defendants often being forced to enter into extremely large settlements.[27] At a minimum, businesses must incur significantly greater legal fees to take these FCA cases through to summary judgment and even trial in order to eventually prevail. This is unfair and legally wrong where the alleged violation is a failure to comply with an ambiguous regulation or contractual provision. This Court should grant the petition and resolve the confusion among the lower courts by holding that a reasonable interpretation of an ambiguous regulation or contract cannot form the basis of a FCA violation.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[27] Within the last several months, Tenet agreed to a $900 million FCA settlement with the United States, and Saint Barnabas Health Care System paid $265 million to resolve FCA allegations. Daniel Yi, *Tenet to Pay $900 Million to Settle U.S. Allegations*, L.A. TIMES, Jun. 30, 2006, at C1.

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July 2006